(1)

No. 05-1621

Supreme Court, U.S.
FILED
JUL 20 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

AJ, a minor child by his father,
JOEL D. JOSEPH, and JOEL D. JOSEPH,

Petitioners,

v.

MICHAEL W. SKOJEC, GALLAGHER, EVELIUS & JONES LLP, BOZZUTO MANAGEMENT CO., and HOUSING OPPORTUNITIES COMMISSION OF MONTGOMERY COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Court grant *certiorari* to review whether Petitioners stated a claim for relief under 42 U.S.C. § 1983 where there are no compelling reasons to review the claim, especially since Petitioners have released Respondents from any such claim?

2. Should the Court grant *certiorari* to review whether the District Court and the Court of Appeals correctly determined that Petitioners' Complaint and subsequent Appeal were frivolous?

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Respondent Bozzuto Management Company has no parent corporation, and no publicly held company owns 10% or more of Bozzuto Management Company's stock.

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, Bozzuto Management Company, Michael W. Skojec, Gallagher Evelius & Jones LLP and Housing Opportunities Commission of Montgomery County respectfully request that the Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Fourth Circuit in this case.

INTRODUCTION

Defendants/Respondents Bozzuto Management Company, Michael W. Skojec, Gallagher Evelius & Jones LLP and Housing Opportunities Commission of Montgomery County submit this Opposition Brief in response to the Petition for a Writ of Certiorari filed by Plaintiffs/Petitioners A.J., a minor child, by his father, Joel D. Joseph, and Joel D. Joseph, individually. Petitioners assert that the Court should review the decision in this matter because the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit are incorrect in their determinations that Petitioners failed to state a cause of action under 42 U.S.C. § 1983. Petitioners also assert that the District Court's award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988(b) and the Court of Appeals' award of sanctions pursuant to Fed. R. App. P. 38 are erroneous.

The Petition should be denied. There are no compelling reasons to review Petitioners' § 1983 claim on the merits. Indeed, both the District Court and Court of Appeals correctly found that Petitioners' claim was "palpably" frivolous. (Pet. App. at 2, 14). Moreover, as memorialized in

a Settlement Agreement and Release of May 1, 2006, Petitioners' claim on the merits also fails because Petitioners have settled, and fully released Respondents from, any claims arising from Petitioners' residency at the Metropolitan Apartments. (App. at 4). Petitioner Joel Joseph's attempt to reverse the awards of attorney's fees and costs entered against him by the District Court and Court of Appeals also fails on the merits.

COUNTER STATEMENT

A. Procedural and Factual Background

Omitted from the Petition is the fact that on or about May 1, 2006, Petitioners entered into a Settlement Agreement and Release in which they released all claims against Respondents, including the very claim they now seek to have this Court review. By way of background, the Petitioners, Joel D. Joseph, and his minor son, A.J., were residents of the Metropolitan Apartments in Bethesda, Maryland. The Metropolitan is owned by Respondent Montgomery County Housing Opportunities Commission and is managed by Respondent Bozzuto Management Company. Following various violations of the lease by Petitioners in the fall of 2004, Bozzuto's counsel for landlord/tenant matters, Respondent Michael W. Skojec, of the law firm of Respondent Gallagher Evelius & Jones LLP, wrote to Petitioner Joel Joseph and advised him of the lease violations. A copy of Mr. Skojec's correspondence was sent to Harold Joseph, Joel Joseph's father, because he was the actual lessee of the apartment in which Petitioners resided.

A dispute arose, and shortly thereafter, Petitioners brought an action in the United States District Court for the District of Maryland alleging a violation of 42 U.S.C. § 1983 (*i.e.*, that the correspondence from Mr. Skojec constituted governmental action and a violation of Petitioners' purported First Amendment rights).[1] The Complaint also included state law claims for fraud, libel, and a violation of the Montgomery County Code.

All Defendants/Respondents moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), and, in a Memorandum Opinion and Order, the District Court dismissed the § 1983 claim with prejudice. (Pet. App. at 4). The Court declined to exercise supplemental jurisdiction over the state law claims. (Pet. App. at 8).

The District Court later granted Respondents' Motion under 42 U.S.C. § 1988(b) and awarded attorneys' fees and costs against Petitioner Joel Joseph. (Pet. App. at 9-15). In so doing, the District Court found that the "frivolousness" of Petitioners' § 1983 claim was "palpable" and an award of attorneys' fees and costs was "not only warranted but positively imperative as an appropriate response to plaintiffs' vexatiousness." (Pet. App. at 14).

Following an appeal by Petitioners, the United States Court of Appeals for the Fourth Circuit affirmed the District Court in a *per curiam* opinion (Pet. App. at 1), denied Petitioners' request for *en banc* review, and granted Respondents' Motion for Sanctions pursuant to Fed. R. App. P. 38. (Pet. App. at 3). At the time the Petition for a

[1] Petitioner Joel Joseph is an attorney who initiated the United States District Court action, the subsequent appeal, and this Petition, on a *pro se* basis.

Writ of Certiorari was filed, still pending in the Court of Appeals for the Fourth Circuit was Petitioners' Motion for Reconsideration of the Court of Appeals' Order granting sanctions as well as the Court of Appeals' determination of the amount of sanctions. Subsequently, on June 21, 2006, the Court of Appeals implicitly denied Petitioners' Motion for Reconsideration and awarded attorneys' fees and costs to Respondents in the amount of $20,000. (App. at 2). On or about June 27, 2006, Petitioners filed a Motion for Reconsideration and Rehearing *En Banc* of the Court of Appeals' monetary sanctions award. The Court of Appeals denied the Motion for Reconsideration and Rehearing En Banc on July 19, 2006 (App. at 1).

B. Petitioners' Release of All Claims

While this case was pending in the Court of Appeals for the Fourth Circuit, Petitioner Joel Joseph and his father, Harold Joseph, filed a separate lawsuit in the District Court of Maryland for Montgomery County against Bozzuto Management Company ("Bozzuto") and the Housing Opportunities Commission of Montgomery County alleging, *inter alia,* that the defendants: permitted birds to nest in the Metropolitan Apartments' parking garage resulting in damage to Joel Joseph's automobiles; failed to properly maintain the Metropolitan Apartments' air conditioning, purportedly resulting in a three-day loss of air conditioning in the Josephs' apartment; failed to change light bulbs in the Josephs' apartment; and failed to provide a screen for the sliding glass door in the Josephs' apartment. Bozzuto filed a counterclaim against the Josephs for unpaid rent, miscellaneous expenses, and physical damage to the apartment unit. Trial was held on February 8, 2006, at which time Bozzuto prevailed on its counterclaim in the amount of Three

Thousand Seven Hundred Fourteen Dollars and Eighty Cents ($3,714.80). The Josephs appealed that decision to the Circuit Court of Maryland for Montgomery County. Just prior to a merits trial of the appeal, the case was settled.

The terms of the settlement, as set forth in the Settlement Agreement and Release (App. at 4-10), required the Josephs to pay Bozzuto the sum of One Thousand Dollars ($1,000.00) and called for a dismissal of the Montgomery County case with prejudice. In consideration of Bozzuto's agreement to compromise the amount it was owed, Petitioners (and Harold Joseph) agreed to

> irrevocably and unconditionally release, acquit, exonerate and forever discharge, Bozzuto, HOC [Housing Opportunities Commission of Montgomery County], their agents, servants, employees, attorneys, including GEJ [Gallagher Evelius & Jones, LLP] and [Michael W.] Skojec, insurers and any and all other persons, firms or corporations for any and all claims they may have, including the pendent state law claims alleged in the Federal Case [(which the Agreement specifically defined as the federal case at issue here)], whether known or unknown against the released parties which in any way arise out of their tenancy or residence at the Metropolitan. . . . and agree not to initiate any further lawsuits, administrative claims or other actions against the released parties arising out of such tenancy or residence. (App. at 6).

The parties also acknowledged in the Agreement that the Federal Case remained pending in the United States Court of Appeals for the Fourth Circuit with respect to Petitioners' Motion for Reconsideration of that Court's Order granting Respondents' Rule 38 Motion for Sanctions. The parties

agreed to abide by the outcome of the Federal Case before the Court of Appeals, including monetary awards or sanctions awarded and affirmed. Respondents specifically did not release their claim for any such monetary awards or sanctions.

ARGUMENTS FOR DENYING THE WRIT

I. THERE ARE NO COMPELLING REASONS TO REVIEW PETITIONERS' 42 U.S.C. § 1983 CLAIM, ESPECIALLY SINCE IT IS BARRED BY RELEASE.

As detailed above, Petitioners have "irrevocably and unconditionally release[d], acquit[ed], exonerate[d] and forever discharge[d]" all Respondents, "for any and all claims . . . which in any way arise out of their tenancy or residence at the Metropolitan. . . ." Yet, Petitioners' § 1983 claim arises directly out of their residency at the Metropolitan Apartments. Petitioners' claim is in response to the reasonable reaction to Petitioners' violations of the lease under which they were residing at the Metropolitan Apartments. Because Petitioners' § 1983 claim falls squarely within the category of claims described in the Settlement Agreement and Release, the claim is released under the terms of the Agreement. As such, Petitioners' further attempt to prosecute the claim before the Court is barred.

Regardless, the lower courts already correctly decided that Petitioners' § 1983 claim and related appeal are frivolous. Thus, for Petitioners to now request that the highest Court of the land review the merits of a frivolous claim that also has been released exceeds all bounds of legitimate

advocacy. Quite simply, there are no compelling reasons to grant the Petition.

II. SANCTIONS WERE APPROPRIATE IN THE DISTRICT COURT AND THE COURT OF APPEALS.

Petitioners also request the Court to grant their Petition for the purpose of reviewing the propriety of the monetary awards entered against them by the United States District Court for the District of Maryland and by the United States Court of Appeals for the Fourth Circuit. For those reasons set forth in Respondents' Motion for Attorney's Fees and Expenses filed in the District Court and their Post-Judgment Motion for Rule 38 Sanctions filed in the Court of Appeals, and those Courts' Opinions and Orders, all of which are adopted herein by reference, Respondents respectfully request that the Court deny the Petition. *See, e.g.*, Pet. App. at 9-15 (granting Defendants'/Respondents' motion for sanctions pursuant to 42 U.S.C. § 1988(b) and finding that "[t]he court has no hesitation in concluding that an award of attorney's fees and costs is not only warranted by positively imperative as an appropriate response to plaintiffs' vexatiousness"). The District Court and the Court of Appeals were correct in ordering Petitioners to reimburse Respondents for the expenses and costs of defending this "palpably frivolous" action. (Pet. App. at 2, 14).

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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**Counsel of Record*

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 05-1419
CA-04-4069-1-AMD

AJ, A minor child by his father Joel D. Joseph;
JOEL D. JOSEPH

Plaintiffs-Appellants

v.

MICHAEL W. SKOJEC; GALLAGHER, EVELIUS & JONES, LLP; BOZZUTO MANAGEMENT COMPANY; HOUSING OPPORTUNITIES COMMISSION OF MONTGOMERY COUNTY, MARYLAND

Defendants-Appellees

ORDER

(Filed July 19, 2006)

The Appellants have filed a motion for reconsideration of the Court's June 16, 2006, order awarding attorney fees, and for a rehearing en banc.

The Court denies the motion for reconsideration and for rehearing en banc.

For the Court

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1419
(CA-04-4069-1-AMD)

AJ, A minor child by his father Joel D. Joseph;
JOEL D. JOSEPH,

Plaintiffs-Appellants,

versus

MICHAEL W. SKOJEC; GALLAGHER,
EVELIUS & JONES, LLP;
BOZZUTO MANAGEMENT COMPANY;
HOUSING OPPORTUNITIES COMMISSION
OF MONTGOMERY COUNTY, MARYLAND,

Defendants-Appellees.

ORDER

(Filed June 21, 2006)

By order dated March 28, 2006, the Court granted appellees' motion for sanctions under Fed. R. App. P. 38. Appellees have filed an itemized statement of attorneys' fees and costs. Appellants have filed an objection to the itemized statement.

The Court recalls the mandate and awards $20,000 in attorneys' fees and costs to appellees to be paid by appellant Joel D. Joseph.

Entered at the direction of Judge Michael, with the concurrence of Judge Hamilton. Judge Luttig was a member of the original panel but did not participate in disposition of this matter. The order is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

For the Court

_____

Clerk

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("the Agreement") is made as of the effective date (which means the date that the Agreement has been signed) by and between Joel Joseph, Alex Joseph and Harold Joseph ("the Josephs") and Bozzuto Management Company ("Bozzuto") and the Housing Opportunities Commission of Montgomery County ("HOC").

WHEREAS, in July 2004, Harold Joseph leased apartment 1013 at the Metropolitan, an apartment building located in Bethesda, Maryland; and

WHEREAS, the Metropolitan is owned by the HOC and managed by Bozzuto; and

WHEREAS, Joel Joseph and Alex Joseph were authorized residents of the apartment leased by Harold Joseph; and

WHEREAS, certain disputes arose during the tenancy between the Josephs, HOC, Bozzuto and their counsel; and

WHEREAS, Joel Joseph and Alex Joseph filed a lawsuit against HOC, Bozzuto, and its counsel (Gallagher, Evelius & Jones LLP ("GEJ") and Michael W. Skojec ("Skojec")) in the United States District Court for the District of Maryland, *Alex Joseph, et al. v. Michael W. Skojec, et al.*, Civil No. AMD 04-CV-4069 ("the Federal Case") in which the Plaintiffs asserted certain federal claims under § [sic] 42 U.S.C. §1983 and alleged certain pendent state claims including violation of the Montgomery County Code, fraud and libel; and

WHEREAS, additional disputes arose between the Josephs, HOC and Bozzuto over the conditions at the

apartment building and over the payment of rent and other expenses, all of which resulted in a second lawsuit filed by Joel Joseph and Harold Joseph against Bozzuto and HOC in the District Court of Maryland for Montgomery County, *Joel D. Joseph, et al. v. Bozzuto Management, Inc., et al.* ("the State Case"), Case No. 20547-2005, in which Bozzuto also filed a Counter-Claim; and

WHEREAS, the State Case resulted in a verdict in favor of Bozzuto against Harold Joseph in the amount of $3,714.80, inclusive of interest and costs; and

WHEREAS, the parties in the State Case have filed an appeal and cross-appeal which is currently pending in the Circuit Court for Montgomery County, *Joel D. Joseph, et al. v. Bozzuto Management, Inc., et al.*, Case No. 6788-D; and

WHEREAS, the parties desire to resolve the disputes described herein;

NOW THEREFORE, for and in consideration of the mutual promises, covenants and agreements stated herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. The foregoing recitals are integral parts of this Agreement and not mere surplusage.

2. The term "parties" as used in the Agreement means Harold Joseph, Joel Joseph and Alex Joseph, Bozzuto Management Company and Housing Opportunities Commission of Montgomery County, their respective principals, agents, employees, representatives, parent, affiliated and subsidiary companies.

3. The Josephs shall pay $1,000 to Bozzuto Management Company in full satisfaction of the specific claims made by Bozzuto in its Counter-Claim filed in the State Case which claim included unpaid rent, late charges, clean up and repair of the apartment, trash removal, carpet replacement and such other items as specifically delineated in the Counter-Claim and Bozzuto fully releases and discharges the Josephs for those claims. The payment described herein shall be made by bank check, certified check or money order.

4. In consideration of Bozzuto's agreement to compromise its claim against the Josephs as contained in its Counter-Claim in the State Case, the Josephs hereby irrevocably and unconditionally release, acquit, exonerate and forever discharge Bozzuto, HOC, their agents, servants, employees, attorneys, including GEJ and Skojec, insurers and any and all other persons, firms or corporations for any and all claims they may have, including the pendent state law claims alleged in the Federal Case, whether known or unknown against the released parties which in any way arise out of their tenancy or residence at the Metropolitan and agree not to initiate any further lawsuits, administrative claims or other actions against the released parties arising out of such tenancy or residence. The parties acknowledge that the Federal Case is currently before the United States Court of Appeals for the Fourth Circuit and that currently pending in that action are issues relating to sanctions sought by Bozzuto and its counsel against the Josephs with respect to the appeal. It is the intent of the parties to abide by the outcome of the Federal Case, including monetary awards or sanctions entered against the Josephs by either the district or appellate court, and the parties do not intend in any way

to affect that outcome of the Federal Case by entering into this Settlement Agreement and Release.

5. The Josephs, Bozzuto and HOC agree to dismiss with prejudice the State Case currently pending in the Circuit Court for Montgomery County so as to avoid further attorney's fees, litigation expenses and other such expenses.

6. In the event that any ambiguity or question of intent or interpretation arises, or in the event of any dispute between the parties with respect to the provisions hereof, this Agreement shall be construed as if drafted jointly by the parties by virtue of the authorship of any of the provisions hereof.

7. Each of the parties represents and acknowledges that, in executing this Agreement, no reliance has been placed upon any representation or statement, other than representations or statements expressly contained in this Agreement, made by or on behalf of any other party with regard to the subject matter, basis, or effect of this Agreement.

8. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

9. The parties agree that any dispute arising out of this Agreement shall be decided under Maryland law and the parties further agree that the venue for the litigation of any such dispute shall be the common law courts of Montgomery County, Maryland.

10. The parties further agree that if any provision of this Agreement is determined to be void or invalid, such

determination shall not affect the validity of any other provision.

11. The parties acknowledge that all negotiations leading to this Agreement are merged into the terms of this Agreement and the terms of the Agreement fully describe the resolution of the dispute between the parties.

IN WITNESS WHEREOF, the parties hereto have executed, or caused their duly authorized representatives to execute this Agreement, under seal, as of the day and year first above written.

4-21-06 — By: /s/ Joel Joseph (SEAL)
Date — Joel Joseph

4-21-2006 — By: /s/ Alex Joseph (SEAL)
Date — Alex Joseph

4-24-2006 — By: /s/ Harold Joseph (SEAL)
Date — Harold Joseph

Bozzuto Management Company

_____ — By: _____ (SEAL)
Date

Housing Opportunities Commission
of Montgomery County

_____ — By: /s/ _____ (SEAL)
Date

IN WITNESS WHEREOF, the parties hereto have executed, or caused their duly authorized representatives to execute this Agreement, under seal, as of the day and year first above written.

_____ By: _____(SEAL)
Date Joel Joseph

_____ By: _____(SEAL)
Date Alex Joseph

_____ By: _____(SEAL)
Date Harold Joseph

Bozzuto Management Company

4-26-06 By: /s/ Richard L. Mostyn (SEAL)
Date

Housing Opportunities Commission
of Montgomery County

_____ By: /s/ _____(SEAL)
Date

IN WITNESS WHEREOF, the parties hereto have executed, or caused their duly authorized representatives to execute this Agreement, under seal, as of the day and year first above written.

_____ By: _____(SEAL)
Date Joel Joseph

_____ By: _____(SEAL)
Date Alex Joseph

_____ By: _____(SEAL)
Date Harold Joseph

Bozzuto Management Company

_____ By: /s/ _____(SEAL)
Date

Housing Opportunities Commission
of Montgomery County

5/1/06 By: /s/ Scott Minton (SEAL)
Date